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STATE OF WASHINGTON
DEPARTMENT OF INFORMATION SERVICES
Olympia, Washington 98504-2445

July 16, 1997

BY FEDERAL EXPRESS

Secretary
Federal Communications Commission
Washington, D.C. 20554

Dear Sir/Madame:

Re: Petition for Reconsideration in CC Docket 96-45

Pursuant to Section 1.429 of the Commission's rules, enclosed are an original plus 11 copies of the Washington State Department of Information Services' Petition for Reconsideration of the Commission's May 8, 1997 Report and Order in CC Docket 96-45.

Please contact me at 360-902-2981 if you have any questions.

Sincerely,

David W. Danner
Senior Policy Advisor

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)

Federal-State Joint Board on)
Universal Service)

CC Docket No. 96-45

PETITION FOR RECONSIDERATION

The Washington State Department of Information Services (DIS)¹ seeks reconsideration of the Commission's May 8, 1997, Report and Order (Order) in the above-captioned proceeding as it relates to universal service discounts for schools and libraries which participate in consortia for purchasing telecommunications services. DIS is pleased that the Commission's Order recognizes the importance of state telecommunications consortia in schools' and libraries' technology planning and implementation for educational purposes. However, DIS is concerned that the Order prohibits subsidies to schools and libraries for services provided through consortia which include private non-profit baccalaureate institutions and which receive services at less than tariffed rates. DIS requests that the Commission amend its May 8, 1997, Order, to clarify that schools and libraries may participate in educational network consortia which include private non-profit baccalaureate institutions without losing eligibility for universal services subsidies based on competitively bid rates.

¹ DIS is a cabinet-level Washington State agency responsible for providing computing and telecommunications services to state agencies and local governments, and for developing policies to promote the efficient use of information technology within Washington State. DIS operates pursuant to Rev. Code Wash. 43.105. Among its numerous activities, DIS convenes and provides staff support to the K-20 Educational Telecommunications Network project, a statewide consortium created by the state

Section 54.501(d) of the Commission's Final Rules states:

(1) For purposes of seeking competitive bids for telecommunications services, schools and libraries eligible for support under this subpart may form consortia with other eligible schools and libraries, with [eligible] health care providers ..., and with public sector (governmental) entities, including, but not limited to, state colleges and state universities, state educational broadcasters counties, and municipalities, when ordering telecommunications and other supported services under this subpart. With one exception, eligible schools and libraries participating in consortia with ineligible private sector members shall not be eligible for discounts for interstate services under this subpart. A consortium may include ineligible private sector entities if the pre-discount prices of any services that such consortium receives from [an incumbent local exchange carrier] are generally tariffed rates.²

Washington State is home to several small and medium-sized private non-profit baccalaureate institutions,³ which are not "public sector (governmental) entities," and may be considered "ineligible private sector entities" for purposes of this section. As DIS understands this language, the Commission would require that where schools and libraries connect to a statewide educational network the members of which include one or more of these independent baccalaureate institutions, services provided to the consortium must be purchased based on tariffed rates, and may not take advantage of leveraged purchasing or economies of scale which are the very rationale for such consortia.

legislature in 1996 to provide cost-effective advanced telecommunications services to K-12 schools, public and private colleges and universities, and libraries. This project is discussed more fully below.

² The Telecommunications Act of 1996 defines "incumbent local exchange carrier" as meaning "with respect to an area, the local exchange area that, (A) on the date of enactment [of the Act], provided telephone exchange service, and (B)(i) on such date of enactment, was deemed to be a member of the exchange carrier association pursuant to [47 C.F.R. 69.601(b)], or (ii) is a person or entity that, on or after such date of enactment, became a successor or assign to a member described in clause (i)." Many of the transport services for the K-20 Educational Telecommunications Network are provided by "incumbent local exchange carriers."

³ These include Antioch University, Bastyr University, City University, Cornish College of the Arts, Gonzaga University, Heritage College, Northwest College, Pacific Lutheran University, St. Martin's College, Seattle University, Seattle Pacific University, University of Puget Sound, Walla Walla College, Whitman College, and Whitworth College. The state Higher Education Coordinating Board has identified these institutions as eligible for student financial aid.

In addition, the Commission states that state networks are not required to contribute to the universal service fund so long as their services are used for government purposes, including services to public schools and libraries. It states:

government entities that purchase telecommunications services in bulk on behalf of themselves, e.g., state networks for schools and libraries, will not be considered 'other providers of telecommunications' that will be required to contribute [to the universal service fund]. Such government entities would be purchasing services for local or state governments or related agencies. Therefore we find that such government agencies serve only their internal needs and should not be required to contribute.⁴

However, where a "lead participant" which operates its own telecommunications network makes service available to non-governmental agencies, the Commission suggests that it may be deemed a "provider of telecommunications" obligated to pay into the fund. DIS is concerned that this language would require a state-run network which makes service available to private non-profit educational institutions to contribute to the fund, and asks the Commission to clarify that this is not its intent.

The Commission's Order May Adversely Affect Washington State's K-20 Educational Telecommunications Network Project

In its current form, the Commission's language may adversely affect schools and libraries in Washington State. In 1996, the Washington State Legislature established and authorized funding for the "K-20 Educational Telecommunications Network," a statewide high-bandwidth backbone network that will eventually serve each of the state's 296 public K-12 school districts, the technical and community colleges, the public baccalaureate institutions, state and local libraries, as well as private K-12 and baccalaureate institutions. The network will provide opportunities for distance learning, administration, and resource sharing through data transport, Internet and Intranet

⁴ Order, at para. 800.

services, videoconferencing, and satellite-delivered full motion video.⁵ During the past year, DIS has been involved in more than 50 competitive bids to acquire services for this statewide consortium. By statute, construction involves at least two phases. Phase 1 of the K-20 network has been completed, and planning and construction of Phase 2, the design of which includes each of the private non-profit baccalaureate institutions identified above, is already underway.

In establishing the network, the Legislature found that “in order to facilitate lifelong learning, educational technology systems must be coordinated among all educational sectors, with other entities of federal, state, and local government, and be readily accessible to the general population of the state. It is the intent of the legislature to make maximum use of a common telecommunications backbone network in building and expanding education technology systems. Therefore, coordinated policy and planning to ensure program quality, interoperability and efficient service delivery are the highest priority of the legislature.”⁶

The Commission’s eligibility criteria for consortia potentially undermine this project, and place Washington State policy makers in the untenable position of choosing between turning down subsidies for schools and libraries or removing Washington’s private non-profit baccalaureate institutions from the network. If the state chooses the former, it stands to lose subsidies that it views as essential for building the network out to high-cost and traditionally underserved areas in a state that is largely rural with many smaller communities located in remote, rugged and mountainous regions. Digital

⁵ Information about the K-20 Educational Telecommunications Network is available on the Internet at <http://www.wa.gov/dis/k-20topc>.

⁶ E2SSB 6705, Sec. 1. (1996), codified at Rev. Code. Wash. Sec. 28D.02 (1996).

transport leases alone for the K-20 network will exceed \$5 million annually, with services to eligible libraries and K-12 schools accounting for nearly half of those costs. While the costs achieved through volume purchasing are significantly less than those available to schools and libraries purchasing separately, the potential loss of federal subsidies for these leveraged services may encourage schools and libraries to look elsewhere for services where subsidies apply, thereby undermining the user base on which the project's economies of scale are predicated. To make matters worse, if the state network includes private non-profit institutions, it may become obligated to pay into the universal service fund because it is no longer serving strictly "internal needs."⁷

To choose the latter creates equally significant problems. First, the participation of independent non-profit baccalaureate institutions serves important public purposes by allowing the exchange of educational programs and resources among private and public institutions at all levels. Washington's private colleges have modest endowments at best, and some are located in geographically isolated areas where public higher educational opportunities are limited.⁸ These institutions prepare thousands of students each year for jobs in Washington State, and their graduates comprise more than 25 percent of the state's schoolteachers. With regard to these institutions, Washington's legislature has specifically "declare[d] it to be the policy of the state of Washington to enable the building, providing, and utilization of modern, well-equipped, efficient, and reasonably priced higher education facilities, as well as the improvement, expansion, and modernization of such facilities, in a manner that will minimize the capital cost of

⁷ Order, at para. 800.

⁸ Heritage College, for example, sits within the Yakima Indian Reservation. Its director was recently recognized with a MacArthur grant for her work providing educational opportunities to Native Americans in central Washington.

their construction, financing, and use.”⁹ The inclusion of independent non-profit baccalaureate institutions in the Washington State K-20 network is clearly consistent with articulated public policy. Second, inclusion of private non-profit baccalaureate institutions allows the state to enjoy larger economies of scale in the purchasing and utilization of information infrastructure for services provided to public entities. Inclusion of these entities increases the size of the “market basket,” putting the state in a stronger position as a volume purchaser. Where goods and services can be shared, allowing costs to be apportioned among a larger consortium results in lower unit costs for all participants. To remove the private non-profit institutions from the K-20 Educational Network Project disserves the public interest.

The Commission’s Justifications for Restricting Private Entities Do Not Apply To Private Non-Profit Colleges and Universities

The Commission’s position requiring tariffed rates for consortia which include private sector entities lacks a compelling justification when applied to independent non-profit colleges and universities. The Commission states that it looks “to ineligible schools and libraries to assume leadership roles in network planning and implementation for educational purposes,” and “encourage[s] universities and other repositories of information to make their online facilities available to other schools and libraries.”¹⁰ Indeed, it recognizes the benefits of collaboration among eligible schools and libraries and private educational entities, saying, “eligible schools and libraries will be eligible for discounts on any dedicated lines they purchase to connect themselves to card catalogues or databases of research materials maintained by religious institutions, and

⁹ Rev. Code Wash. 28B.07.010.

¹⁰ Order, at para. 562.

any art or related materials maintained by private museum archives. Connections between eligible and ineligible institutions can be purchased by an eligible institution subject to the discount as long as the connection is used for the educational purposes of the eligible institution.”¹¹

It is curious that the Commission should allow connections between eligible schools and libraries and ineligible private colleges and universities, yet restrict the use of such connections only to the eligible schools and libraries, and not to the private colleges connected. First, this is an inefficient use of resources in that it requires the private schools to unnecessarily duplicate costly infrastructure for their own use while denying public entities the larger economies of scale that come with volume purchasing. Second, as discussed below, the Commission’s apparent rationale for discouraging participation by private non-profit entities -- i.e., that it wanted to avoid allowing public consortia to act as resellers to the private sector – is not warranted in the case of private colleges.

Last year, the Federal-State Joint Board on Universal Service recommended that schools and libraries be permitted “to aggregate with local customers, such as health care providers, community colleges, or commercial banks,” even though aggregation of public and private entities may raise administrative difficulties in enforcing eligibility and resale limitations imposed by Congress. In the Joint Board’s view, “the benefits of such aggregation outweigh the administrative difficulties.”¹² However, the Commission declined to accept this recommendation, expressing its concern that “permitting large

¹¹ Id.

¹² In the Matter of Federal-State Joint Board on Universal Service, Recommended Decision, CC Docket 96-45 (Nov. 8, 1997), at para. 537.

private sector firms to join with eligible schools and libraries to seek prices below tariffed rates could compromise both the federal and state policies of non-discriminatory pricing.”¹³ Instead, it held that schools and libraries will be eligible for universal service discounts and prices below tariffed rates “only if any consortia they join include only other eligible schools and libraries, rural health care providers, and public sector (governmental) customers.”¹⁴

While DIS understands and accepts the Commission’s position with regard to “commercial banks” and other for-profit entities, DIS questions whether the federal and state prohibitions on discriminatory pricing need apply with regard to non-profit educational institutions that attach to state government networks. First, 47 U.S.C. sec. 202, which prohibits price discrimination for like services, leaves the Commission some discretion in determining whether differences in prices among services are “undue or unreasonable.” See, e.g., Associated Press v. F.C.C., 452 F.2d 1290 (D.C. Cir., 1971); National Association of Regulatory Utility Commissioners v. F.C.C., 737 F.2d 1095 (D.C. Cir.), cert. denied, 469 U.S. 1224, 1225 (1984). Indeed, the Commission’s discussion in this proceeding has focused on the use of educational consortia to provide telecommunications services to for-profit private sector entities, i.e., the use of consortia

¹³ Order, at para. 477.

¹⁴ Id. at para. 478. The Commission continued, “Eligible schools and libraries participating in consortia that ineligible private sector members will not be eligible to receive universal service discounts unless the pre-discount prices of any interstate services that such consortia receive from [incumbent local exchange carriers] are generally tariffed rates. We conclude that this approach satisfies both the purpose and the intent of the Joint Board’s recommendation because it should allow the consortia containing eligible schools and libraries to aggregate sufficient demand to influence existing carriers to lower their prices and should promote efficient use of shared facilities. This approach that state laws may differ from federal law with respect to non-discriminatory pricing requirements. We also recognize, however, that should states so choose, they may impose the same structures as detailed herein, on the basis of similar policies at the state level.” Id.

by “large private sector firms”¹⁵ or a “for-profit business.”¹⁶ Where the entities included in the consortia are not for-profit businesses but private non-profit educational institutions serving important public purposes identified by state statute, the considerations underlying the resale prohibition are different. In such cases, the private colleges are more akin to “related agencies” for which the state network administrators are not deemed to be “providers of telecommunications” for purposes of universal service fund contributions.¹⁷

In this regard, it is significant that Congress did not exclude private K-12 schools from the universal service subsidies. The Commission has pointed out that both public and non-public elementary and secondary schools are eligible for subsidies so long as they meet the statutory definition of an elementary or secondary school found in the Elementary and Secondary Education Act of 1965, do not operate as a for-profit business, and do not have an endowment of more \$50 million.¹⁸ It is inconceivable that Congress would have intended to allow private K-12 schools to enjoy federal subsidies, while denying private institutions of higher education even the ability to join in educational consortia to leverage the costs of telecommunications services.

Similarly, at the state level, it is unlikely that non-discriminatory pricing statutes would create an impediment to allowing private colleges to enjoy economies of scale by joining consortia with public educational institutions. Although the Legislature made clear that the Washington Utilities and Transportation Commission shall have primary jurisdiction to determine whether any rate, regulation, or practice of a

¹⁵ Order, at para. 477.

¹⁶ 47 U.S.C. Sec. 254(h)(4).

¹⁷ Order, at para. 800.

¹⁸ FCC Public Notice DA-97-1374 (released July 2, 1997), p.1.

telecommunications company violates the non-discrimination provision contained in state statute,¹⁹ the provision does not necessarily apply to competitively-bid services. In any event, the Washington State Legislature also specifically directed that the K-20 Educational Telecommunications Network would extend the benefits of leveraged purchasing and coordinated planning – in other words, costs below tariffed rates -- to private non-profit baccalaureate institutions.²⁰

DIS stresses that by allowing eligible schools and libraries to receive subsidies based on below-tariffed rates for services provided through the K-20 Educational Network in Washington, the Commission would not be directing federal tax dollars to subsidize private colleges or any other ineligible entity, either directly or indirectly. The network administrators will, as the Commission requires, “keep and retain careful records of how they have allocated the costs of shared facilities in order to charge eligible schools and libraries the appropriate amounts.”²¹ Nor will the inclusion of private colleges in Washington – as opposed to including “large private sector firms” -- significantly affect the private telecommunications companies’ customer base or business opportunities. Digital transport services for the network are provided almost entirely by private companies through competitively bid contracts. The modest budgets of the private colleges in many cases preclude their acquisition of advanced telecommunications services except through a consortium that allows leveraged purchasing. The K-20 Educational Telecommunications Network allows aggregation of demand among private colleges where no demand may have existed before.

¹⁹ Rev. Code Wash. 80.36.130, 80.36.180 (1996).

²⁰ Rev. Code Wash. 28D.02.070 (1996).

²¹ Order, at para. 569.

Conclusion

For the reasons set forth above, DIS asks the Commission to amend Section 54.501 of its final rules to allow eligible schools and libraries to participate in consortia which include private non-profit baccalaureate institutions without denying these consortia the benefits of leveraged purchasing at below tariffed rates. It also asks that the Commission amend paragraph 800 of its Order to clarify that state networks which provide services to private non-profit educational institutions are not required to contribute to the universal service fund. These amendments will serve the public interest by allowing public schools and entities to enjoy larger economies of scale while providing private colleges access to needed infrastructure and services. For Washington State in particular, these amendments will allow DIS to fulfill its legislative mandates to provide services to all higher education institutions in the state.

Respectfully submitted,



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